

IN THE MATTER OF ARBITRATION BETWEEN }	
EDUCATION MINNESOTA }	DECISION AND AWARD
CROSBY-IRONTON }	OF
(THE "UNION") }	ARBITRATOR
and }	
INDEPENDENT SCHOOL DISTRICT 182 }	
CROSBY-IRONTON }	BMS CASE: 06-PA-136
(THE "DISTRICT") }	

ARBITRATOR: Eugene C. Jensen

DATE AND LOCATION OF HEARING: June 6, 2006,
Crosby-Ironton District Office
711 Poplar Street
Crosby, Minnesota 56441

DATE OF FINAL SUBMISSIONS: July 7, 2006

DATE OF AWARD: August 15, 2006

ADVOCATES

For the Union:

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For the District:

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GRIEVANT

Maureen Morrow
17880 Triangle Road
Ironton, Minnesota 56455

WITNESSES

For the Union:

Darrell Baty
Maureen Morrow
Elaine Fuller Carter

For the District:

Linda Lawrie
Jim Christenson
Melinda Jezierski

ISSUE

Did the District violate the “No Reprisal Clause” of the Memorandum of Understanding (hereinafter the “MOU”) located on page 34 of the 2005 – 2007 Agreement between the parties when it failed to continue the employment of Maureen Morrow (hereinafter the “Grievant”)? And, if so, what shall the remedy be?

BACKGROUND

Negotiations for the parties’ 2003 – 2005 Agreement resulted in a strike that commenced on February 9, 2005, and ended on April 6, 2005 (thirty-eight and one-half school days). A “Return to Work” MOU (mentioned in “Issue” above), was included in the next Agreement to afford both parties certain protections.

The Grievant, a second year probationary employee, chose to participate in the strike from the first day forward. Approximately the same time the strike ended, the Grievant was terminated for budgetary reasons. Later, the District re-opened a Spanish teacher position; the Grievant applied for it and was not selected.

The Union believes that the District violated the MOU and treated the Grievant differently than they would have had she not participated in the strike. The District disagrees and believes that it made an appropriate hiring decision based solely on who was best qualified.

JOINT EXHIBITS

1. Teachers’ Master Agreement (2005 – 2007) between Independent School District 182 and Education Minnesota, Crosby-Ironton. (excerpts)

Article X - POSTING

Section 1. The District and the Exclusive Representative declare their support of the principle of filling vacancies, including temporary vacancies and vacancies in supervisory

positions, from within the teaching staff. The District and the EMCI recognize the ultimate responsibility is the District's to fill vacancies in the best interest of the school system.

Section 2. Responsibility: It shall be the responsibility of the District to give written notice of all certified job vacancies, qualifications and procedures for application to a designated representative of the EMCI for posting by the EMCI. Any current bargaining unit member, excluding casual and long-term substitutes, applying for the position shall receive an interview prior to outside applicants. The School District reserves the right to select, in its judgment, the best qualified applicants (among existing staff and outside applicants) based upon professional background, training, experience, and other relevant factors.

The MOU on page 34 of the Agreement. (excerpt)

No Reprisal Clause:

The District agrees that no reprisal, punishment, or action will be taken against a teacher because of a teacher's lawful participation in a teacher's strike, and the District further agrees that there shall be no difference in the privileges of employment accorded a teacher participation in such a strike than there would have been if the teacher had not participated.

2. Notice of Termination and Non-Renewal Affidavit:

Dear Ms. Maureen Morrow:

You are hereby notified that at a regular meeting of the School Board of Independent School District No. 182 held on April 4, 2005, a resolution was adopted by a majority vote to terminate your contract effective at the end of the current school year and not to renew your contract for the 2005 – 2006 school year. Said action of the board is taken pursuant to M.S. 122A.40, Subd. 5.

You may officially request that the school board give its reasons for the non-renewal of your teaching contract. For your information, however, this is taken because of the financial condition of the school district and decrease in enrollment.

Yours very truly,
School Board of Independent
School District No. 182

3. Grievance Documents:

- July 12, 2005, Grievance – Statement of Grievance: “The School District violated my contractual rights when they refused to retain me in my Spanish position for the 2005-2006 school year.”

Contract Provision Allegedly Violated: “The Memorandum of Understanding prohibiting post-strike reprisals.”

Redress Sought: “I will be offered re-employment in my Spanish teaching position with the Crosby-Ironton School District or any other position that I am licensed for; compensated for any lost time retroactive to the beginning of the 2005 – 2006 school year, and considered to have contributed consecutive service to the School District.”

- July 19, 2005, response from the Superintendent, Linda E. Lawrie – “The grievance is denied because an arbitrator does not have jurisdiction over this matter or authority to award the requested relief. The grievance is also denied on its merits.”
- August 16, 2005, letter from Linda Lawrie to the Union reporting on the actions of the Special School Board Meeting on August 15, 2005.

“This is to inform you that the Board of Education voted unanimously to deny the grievance filed by Education Minnesota-Crosby-Ironton on behalf of Maureen Morrow at the Special Board Meeting held on August 15, 2005 at 6:30 p.m.”

4. Evaluations of Maureen Morrow’s work in the following months: October, 2003; December, 2003; March, 2004; September, 2004; November, 2004; and April, 2005. (The content of the evaluations will be addressed in subsequent sections of this award).

THE UNION'S EXHIBITS

1. Saturday, April 23, 2005, Minneapolis Star Tribune newspaper article, "All A's and B's for students at Crosby."
2. A Union prepared chart listing probationary teachers, their assignments, their strike activities, their non-renewal status, and whether they received a job offer from the District.
3. Friday, June 24, 2005, e-mail from Linda Lawrie, Superintendent, to the Grievant. The e-mail notified the Grievant that "the successful candidate" had accepted the Spanish teaching position that she previously held.
4. February, 2005, Minnesota Department of Education document, "Teacher Supply and Demand."
5. April 7, 2005, letter from Jim Christenson, Principal, to "Whom It May Concern," in which he recommends the Grievant to other potential employers.
6. ACTFL Proficiency Guidelines – Speaking.
7. A written evaluation of "Spanish Speaking Proficiency" for the Grievant. The document was prepared by Elaine Fuller Carter, following her evaluation of the Grievant on June 2, 2006.

THE DISTRICT'S EXHIBITS

1. April 11, 2005, memo from the Grievant to Jim Christenson, regarding "Two Things..." 1) Mexico trip, and 2) Tenure.
2. Resume of Linda E. Lawrie, Superintendent.
3. June, 2006, documents that show the number of teachers and students in the District for each school year from 2002 through 2006.
4. Job posting, interview schedule, applicant rating forms, letters of application, letters of recommendation, and other documents related to filling the Grievant's previous position as a Spanish teacher.

THE UNION'S EVIDENCE

Darrell Baty, Field Representative, for Education Minnesota testified:

- 28 years as a Field Representative and assigned to the Crosby-Ironton Local since August of 1999.
- The 2003 – 2005 contract negotiations were difficult and resulted in a 38 ½ day strike.
- The strike was especially acrimonious because the District decided to keep the school open using replacement workers. “As soon as you open a building, you not only divide the teaching staff, but you divide the community . . .”(Transcript page 25 [T. 25]).
- The District paid the replacement teachers over \$300.00 per day, which was more than they were paying their most long-term staff.
- After the strike, the superintendent “decreed that everybody [students] would get an “A” or a “B” for the balance of the year, which totally astounded our teachers . . . “ (T. 28).
- Union Exhibit 1, April 23, 2005, news article in the Minneapolis Tribune, was introduced. This article, in part, discusses the “A” or “B” grade issue mentioned above.
- New, non-tenured, teachers must serve a three year probationary period, and there were five probationary teachers during the period of the strike. Union Exhibit 2 was introduced:

**Probationary Teachers
Spring 2005**

Teacher's Name	Assignment	Strike Activity	Non-Renewed?	Job Offer?
1	EBD Teacher	Participated in the Strike after replacement workers were hired at the high school	Yes	No. Did not have full EBD licensure
2	Math Teacher	Participated in the Strike after replacement workers were hired at the high school	Yes	Yes. Had accepted a position in another district
3	EBD Teacher	Participated in the Strike after replacement workers were hired at the high school	Yes	Yes
4	Speech Clinician	Last probationary teacher to participate in the strike	No	Retained her job
5. Grievant	Spanish Teacher	Participated in the strike from the first day	Yes	No

- Teachers 1, 2 and 3 crossed the picket line and taught for a month after the strike began. During the first month they stopped into strike headquarters before and after their work shifts to “help out.” When the District hired replacement teachers, they stayed out on strike.
- Teacher 4 continued to cross the picket line for most of the strike.
- The Grievant never crossed the picket line.
- Teachers 1, 2, 3, and the Grievant (5) were terminated (non-renewed) effective April 4, 2005.
- The Union was in touch with these employees around “April 7th or 8th” and knew what happened to each in the ensuing months: *ARBITRATOR’S NOTE: The following quotes are from pp. 41 & 42 of the transcript*
 1. Teacher 1 “was not offered a position. She wasn’t properly licensed . . .”
 2. Teacher 2 “was offered a position with the school district. . . “ [however] [h]e took a position in Brainerd.”
 3. Teacher 3 “was given her job back.”
 4. Teacher 4 “was never terminated, and so she never had need of a job offer.”
 5. The Grievant “applied for her position, was not given the position. The position was reposted, [and she] was not given the position.”
- Probationary teachers receive three evaluations per year, and Joint Exhibit 4 contained the Grievant’s evaluations. The witness believed that, except for the last, all the Grievant’s evaluations were outstanding.
- He felt that the last evaluation was “retaliatory” against the Grievant for her “experience in the strike, and the fact that she worked every day at strike headquarters. . . “ (T. 56)

The Grievant, Maureen Morrow, testified:

- Graduated from North Dakota State University of Fargo with a double major in Spanish education and international studies.
- She lived in Venezuela for a year during her junior year of high school, and, while in college in 2001, she studied at a university in Mexico.

- Other than a “short long-term sub” position in Staples, her professional teaching experience was in the Crosby-Ironton School District (2003 – 2004 and 2004 – 2005).
- During her first year of teaching she told her principal (Jim Christenson) that she and her husband were planning on building a home in the area because she wanted to know if her job was secure. He assured her that it was.
- She was “nervous” about going on strike “but [she] knew, growing up in a union background, that it was the right thing to do.” (T. 74)
- Students asked her many questions during the weeks that led up to the strike. She operated under the belief that she was not supposed to talk to the students about the strike.
- On at least one occasion, however, she did respond to a student’s question:

“A student had heard that some replacement teachers were going to be brought in . . . [a]nd asked what they were supposed to do; and I jokingly told them that they could behave however they wanted because I wasn’t going to be there; but in hindsight, it was not good decision.” (T. 75)
- She was questioned regarding the above-mentioned incident by the principal: at first she denied it, however, later in that same conversation she told him the truth.
- Her employment with the District ended on June 30, 2005, and a trip to Mexico, she was supposed to chaperone, was scheduled for July 15, 2005. She was concerned about not having liability insurance for the trip. She contacted her union representative about when the contract year ended. She then e-mailed the “program” that set up the trip and informed them about her concern. About that same time, she notified the principal that she couldn’t go because she wasn’t covered by insurance. She later found out that she was covered by insurance through the “program.” She contacted the principal and told him she could go. The principal, however, told her he had already forwarded her earlier decision to the superintendent, and that it was too late to change her plans.
- She was surprised that the April 19, 2005, evaluation contained comments about how much Spanish was being spoken in her classroom. This concern had never been brought up before.

- She also made comments about the “collage” activity that was mentioned in that same evaluation:

The collage was an excellent activity if you have the students either write or speak Spanish about their seasonal pictures. (T. 83)

She did have the students speak in Spanish about the collage following its completion.

- She applied for and interviewed for the Spanish teacher opening that became available after her non-renewal. Jim Christenson, Linda Lawrie (District Superintendent) and Irma Flores (a native Spanish speaker) interviewed her for the position. It was Ms. Flores’ job to ask every third question in Spanish.
- She received an e-mail (Union Exhibit 3) from Ms. Lawrie that another candidate had been selected for the position.
- Although she was aware that the District had wide discretion regarding who they hired, she felt that she would have been hired had it not been for her participation in the strike.

Elaine Fuller Carter, a retired professor from Saint Cloud State, testified:

- Ms. Carter has a doctorate degree “in foreign language education with supporting areas in Spanish, higher education, and intercultural communication.” (T. 239)
- She is a member of the American Counsel on the Teaching of Foreign Languages (ACTFL) and previously was a tester of oral proficiency in Spanish.
- She testified regarding the ACTFL proficiency guidelines:

There are four overall levels in the guidelines, beginning with novice and working novice, intermediate, advanced, superior. Each of those levels below the level of superior has three sublevels, low, mid and high. And in each case, the high level is really - - a speaker at a high level can carry out the functions and do - - basically, behave like the next higher level up quite consistently but cannot quite maintain it all of the time.

She introduced Union Exhibit 6 into evidence. This document was the most recent version of the ACTFL Proficiency Guidelines for Speaking.

- She conducted an examination of the Grievant, and found her to be at the “advanced – low level.” (T. 254 and Union Exhibit 7)

THE DISTRICT'S EVIDENCE

Linda Lawrie, Crosby-Ironton District Superintendent, testified:

- Employed as Superintendent of the Crosby-Ironton School District for four years. Planned to leave the District on June 30, 2006.
- Introduced her resume (District Exhibit 2). She has a specialist degree in educational administration and is licensed in elementary education, special education, administration, principalship and as a superintendent. In addition, she had worked in education since 1970 with experience as a classroom teacher, special education teacher, assistant principal, principal and currently as a superintendent.
- Instituted a new hiring system when she came to the District. Interviewing teams, rather than individuals, rank applicants using a point system. She has been involved in most of the teams. For licensed teaching staff, they try to “find the best qualified candidate for the position from the pool of candidates . . .” (T. 106)
- She was on the interviewing team that selected the Grievant when she was first hired by the District.
- She views the three year probationary period as a period to “nonrenew a teacher if that teacher either needs improvement or is average or adequate and you’re really looking for someone who is superior or is getting to that superior level.” (T. 107)
- She introduced District Exhibit 3, a four page document containing graphs to show the District’s enrollment from 2002 through 2006. It also contained the enrollment pattern immediately preceding, during and following the strike.
- The School Board made the decision to bring the children back to school, and it was her job to implement the Board’s decision. They brought back students one grade at a time.
- Many families moved their children to other school districts during the strike. The District had no idea how many students would be back, and

they placed four probationary teachers on a non-renewal status. The financial support for school districts from the State of Minnesota is based on the number of pupils that are actually enrolled.

- Referring to Union Exhibit 2, she testified about the probationary teacher who was not put in a “non-renewal” status (Teacher 4): “Speech language special education teachers, that licensure is very difficult to find - a teacher with that licensure.” She then described what happened to each of the other probationary teachers listed on Union Exhibit 2 (including the Grievant). (T. 120)
- She introduced District Exhibit 4. It contained a series of documents relating to the Spanish Teacher position that was posted on April 18, 2005:
 - April 18, 2005, posting
 - Interview schedule
 - Applicant rating forms
 - May 12, 2005, form showing the results of the 1st interviews
 - Letters of application from the candidates
 - Letters of recommendation for candidates
- She was on the interviewing team for the first interviews that were conducted on May 12, 2005. She was not on the second interviewing team. Jim Christenson and Irma Flores participated in both teams. The second interviewing team rated only one applicant on June 9, 2005. Following the first interviews, the position was offered to two of the three candidates, and both chose not to accept the position. The Grievant was not offered the position. Following the second round, the single applicant was offered the position. That applicant was finishing school and did not have a license to teach Spanish. She did gain licensure prior to beginning her employment with the District.
- She testified that if there hadn’t been a better qualified applicant, she would have “absolutely” hired the Grievant.

Jim Christenson, High School Principal, testified:

- Employed by the District for the past twenty-two years. Principal for the past three years.
- He has been on all of the interviewing teams for all staff, and he supervises the probationary teachers. The Assistant Principal supervises the tenured staff.

- He was on the interviewing team that originally hired the Grievant. She was the best candidate for the position.
- He had a parent come into his office in January of 2005, and “they had a real problem with some comments that - - that Maureen - - you know, Ms. Morrow had said in the class.” He talked to the Grievant about the incident and she denied that she made the comments. (T. 177)
- During the strike “[he] had a few parents that came in picking up packets of materials . . . and a couple of them stopped in - - into [his] office and just said, you know, they had a concern about what was - - things that were said in - - in the Spanish classroom before the - - you know, before the strike happened. . . . and it was exactly the same as what the other parent had said . . . if they - - the school tries bringing in replacement teachers or substitute teachers during the strike, to, you know, act up and - - misbehave.” (T. 178)
- Following the strike he talked to the Grievant about the parents’ allegations, and she admitted that she had made the statements. She then apologized.
- He went over his involvement with the above-mentioned student trip to Mexico. His recollections were consistent with the Grievant’s. In the end, he told her, “I wish that you would have checked all these things out ahead of time because I felt like I was kind of stuck in the middle of it.” (T. 187)
- He then summarized the selection process that was used to fill the Grievant’s previous position. His recollections were consistent with the Superintendent’s. In addition to the interviews, he also made calls to references that the candidates had supplied. All three teachers that were offered the position received very positive comments from their principals and/or co-workers. The first candidate who was offered the position had seven years of teaching experience; the second candidate had two years of teaching experience; and the third was just finishing college (the third candidate accepted the position). He felt that all three candidates were better qualified than the Grievant.

Melinda Jezierski, Elementary School Principal, testified:

- She was completing her third year as Elementary School Principal at the time of the hearing, and she holds licensures in the following: K – 6 elementary education, 7 – 12 coaching, K – 12 principal, and district superintendent. (T. 223)

- She was on the second interviewing team (June 9, 2005) that interviewed only one candidate. This candidate was offered the position and she eventually became the new Spanish teacher. Irma Flores and Jim Christenson were also on the team. Ms. Jezierski is a friend of Ms. Flores, and she said that when comparing the new candidate to the others “she [Irma] said that she was the most fluent and had the best command of the language.” (T. 231)

THE UNION’S ARGUMENT

ARBITRATOR’S NOTE: The following are excerpts from the Union’s Post-Hearing Brief (UB).

The Union argues that there is only one issue before the Arbitrator: “Whether the District violated the Master Agreement when it failed to retain Ms. Morrow [the Grievant] as a teacher in the District.” (UB 1) And, it offered the following to substantiate its claim that the Grievant suffered due to her strike activities:

The teachers’ strike lasted 38½ days. It was particularly acrimonious because of the Districts decision to open school during the strike. (UB 4)

She [the Grievant] decided to go on strike and participated from the first day. She was the only probationary teacher that did not cross the picket line. (UP 5)

. . . [T]he District cut four of the five probationary teachers; it sent termination notices to all four who had been supportive of the Union and joined the strike within the first month. [Teacher 4], the last teacher to join the strike, was the sole probationary teacher to keep her position. (UB 6)

The District’s claim that it kept [teacher 4] (while terminating the other probationary teachers) because of her licensure area is simply not believable. The MDE report [Union Exhibit 4] shows that there was less of a shortage in her area than the licensure areas of any other probationary teacher. More importantly, even in the one area the District knew would be extremely difficult to fill – EBD – it terminated probationary teachers [teachers 1 and 3]. (UB 7)

. . . [T]he District needed at least a partial position in Spanish. Despite this requirement, the District did not reduce the Spanish position to part-time. Instead it eliminated the entire position so Maureen [the Grievant] could be terminated. (UB 8)

Only one probationary teacher had her subject matter competency questioned: Maureen Morrow, the sole probationary teacher to participate in the strike from the first day. (UB 9)

Prior to the strike Maureen Morrow's evaluations were stellar. . . . (UB 9)

Her sixth and final evaluation is markedly different. For the first time, the principal was critical of her teaching practices. He questioned the relevance of a collage activity . . . and assumed that the students were simply cutting and pasting. . . . For the first time he states that he would like more Spanish spoken during the class.

This evaluation also notes two other areas of concern. First, the evaluation reports an inappropriate comment Ms. Morrow made just prior to the teacher strike. . . (UB 10)

A student asked about how they should behave for the replacement teachers. Maureen responded, in a comment intended to be joking, that she wouldn't be there so it didn't matter to her how the students behaved. She acknowledges this was an inappropriate comment. . . . (UB 10)

More troubling is the suggestion that Maureen should have contacted Jim Christenson before she "forfeited" the opportunity to accompany students on a trip to Mexico. First the trip was not a requirement of her position, even if she had stayed in Crosby-Ironton. . . . Second, Ms. Morrow contacted Mr. Christenson before telling ISE [the trip sponsors] she couldn't go on the trip, due to concerns about liability insurance. . . . (UB 10-11)

[T]he School District went to great lengths to attempt to show a fair, objective interview process. However, upon examination, it is clear the process was anything but fair. The interview structure allowed totally subjective assignment of points. In addition, the points do not reflect what the District knew about Maureen's performance. (UB 11)

. . . Jim Christenson's ratings are inconsistent with his evaluations of Maureen. He rated her "2" for use of different teaching methods/strategies in her classroom (Dt. 4), despite numerous evaluations commending her on her use of a variety of teaching styles, having students read, write, listen and speak Spanish. . . . (UB 11).

Particularly troubling are the comments by both Superintendent Lawrie and Jim Christenson indicating they gave Maureen low ratings because she identified the need to be mindful of boundaries with students as a weakness in both her initial interview and her re-interview. (Tr. 131, 189-90). Neither the superintendent nor the principal offered a single example of Maureen actually having a boundary problem with students. (UB 11)

. . . [T]he evidence clearly shows that Maureen has a high level of fluency and that the person the District used to “assess” her fluency did not do so effectively. (UB 12)

The District refused to re-instate Maureen even when she was the *only* qualified candidate.

The District interviewed three candidates. It offered positions to two of them. Both refused. Maureen Morrow was the only remaining candidate. If the Superintendent’s statement was true, the District “absolutely” should have offered the position to Maureen. Instead, it re-opened the position, extending the application date. It accepted a new application and hired another teacher. (UB 13)

THE DISTRICT’S ARGUMENT

ARBITRATOR’S NOTE: The following are excerpts from the District’s Post Hearing Brief (DB).

The grievance must fail at the outset as there is no contractual right of the grievant to be hired by the district. It cannot be reprisal for the district to fail to do what it is not required to do – either by law or by the contract.

The Grievant has the burden of proof in this case. She must show that a contract violation occurred and that it occurred *because of* her participation in the strike. In other words, but for the Grievant’s participation in the strike, she would have been hired to a District position. (DB 7)

The redress sought by the Grievant is in excess of that to which a probationary teacher is entitled. She requests the following relief (Jt. Exhibit 3):

“I will be offered re-employment in my Spanish teaching position with the Crosby Ironton School

District or any other position that I am licensed for, compensated for any lost time retroactive to the beginning of the 2005-2006 school year, and considered to have contributed consecutive service to the School District."

This relief would essentially usurp the District's hiring authority and would elevate the Grievant to a privileged status. (DB 8)

It is well settled that the Grievant bears the burden of proof. The contract term allegedly violated in this case contains a prohibition on reprisal upon the return to work by striking teachers. However, this does not erode the District's inherent managerial rights. . . .

The grievance was filed July 12, 2005. The time to grieve the non-renewal (if any such right existed at all) would have passed twenty business days after the non-renewal resolution. (*See Jt. Exhibit 1, Article XIX, Section 2.*) The Grievant has, thus, acquiesced in the District's absolute right to non-renew her contract as a probationary teacher. Her argument, then, is that the District was required to rehire her. The argument has no merit.

To sustain a claim of reprisal for participation in the strike, the Grievant must show that 1) she participated in the strike (protected union activity); that 2) the District took adverse action against her; and that 3) the adverse action would not have occurred but for the protected participation in the strike. It is undisputed that the Grievant took part in strike activities. The other two required elements have not been proven by the Grievant. (DB 10)

In this case, the Grievant has not made a prima facie showing that her participation in the strike was a motivating factor in the District's decision not to hire her for the 2005-2006 school year. . . . [T]he Grievant must prove that the District specifically acted upon anti-union animus when it did not hire the Grievant. This she has not done. (DB 11)

[T]he District has presented ample evidence of a legitimate non-discriminatory reason for its hiring decision for the Spanish position in June of 2005. (DB 12)

The evidence is undisputed that the Grievant had lied to her supervisor about her actions/statements to students related to the labor dispute. (DB 12)

No evidence was presented to undermine the economic reasons stated by the School Board. When the strike ended and staffing needs were re-examined for the coming year, 2005-2006, a number of positions were opened. Former probationary teachers were allowed to apply for positions. Some were hired, and some were not. The District was entitled to utilize its sole discretion in these hiring decisions. (DB 13)

Ultimately, the Grievant may assert that the District's stated reasons for not hiring her were pretextual. She has presented no evidence that the District interview team's assessments of the candidates were not accurate and genuine. (DB 14)

[T]he relief requested by the Grievant is beyond the authority of the arbitrator. The Grievant requests that the arbitrator order that she be hired by the District, retroactive to June of 2005. . . . Granting this relief would confer tenure upon the Grievant, as the 2005-2006 school year would have been her third probationary year. . . .

To grant the Grievant's requested relief would require the arbitrator to usurp the inherent hiring discretion of the District and convey a benefit upon the Grievant that she does not have under contract or law. (DB 15)

DISCUSSION AND DECISION

I shall first address any concerns about the Arbitrator's authority to make a decision in this case. It is obvious that a single sentence contained in a memorandum of understanding gives rise to this dispute:

The District agrees that no reprisal, punishment, or action will be taken against a teacher because of a teacher's lawful participation in a teacher's strike, and the District further agrees that there shall be no difference in the privileges of employment accorded a teacher participation in such a strike than there would have been if the teacher had not participated. (p. 34 of the Teacher's Master Agreement)

Absent this sentence, the Grievant's assertion that she was treated unfairly would probably not be appropriate for this arbitration. However, the sentence is a part of the Agreement, and it is proper subject matter for the grievance procedures outlined in Article XIX:

“Grievance” means dispute or disagreement as to the interpretation or application of any term or terms of this Agreement. . . . (Section 1. Definitions, p. 17) [underlined for emphasis]

If the parties are unable to reach agreement within ten (10) days after the first Level III meeting, either party may request arbitration . . . (Section 4. Level III. p. 18)

The decision of the arbitrator shall be final and binding on all parties to the dispute unless the decision violates any provision of the laws of Minnesota or rules or regulations promulgated thereunder, or municipal charters or ordinances enacted pursuant, thereto, or which cause penalty to be incurred thereunder. (Section 5. Level IV. P. 19)

The District alleges that, since the Grievant did not file a grievance on her non-renewal, she waived her right to question her non-renewal. “The grievance was filed July 12, 2005. The time to grieve the non-renewal . . . would have passed twenty business days after the non-renewal resolution. . . . The Grievant has, thus, acquiesced in the District’s absolute right to non-renew her contract as a probationary teacher. Her argument, then is that the District was required to rehire her. The argument has no merit.” (DB 10)

In cases of discrimination, it is often true that you must examine behaviors over time, and not just make decisions based on a single event. I see the non-renewal as only one piece of the puzzle, and yet it is a piece. Afterall, how could the Grievant have predicted that she would have not been hired, if and when the position later reopened? The decision to non-renew was based on economic reasons. Absent knowledge of later actions on behalf of the District, why would the Grievant be suspicious of the District’s motives. I find no fault with the Grievant for not filing a grievance at that time, nor should it lessen the Union’s argument.

I conclude that this grievance is properly before me, and that it is my job to weigh the evidence to determine if a violation of the MOU occurred.

As to the Issue of “burden of proof,” I believe that burden is properly the Union’s.

This leads the Arbitrator to another topic for discussion prior to reviewing the evidence: what proof is necessary for the Union to prevail? I will decide this case based on a preponderance of evidence. As in discrimination cases, one seldom sees a “smoking gun.” I must look at all the evidence, and my analysis and decision will reflect just that: all the evidence.

Very little evidence was in dispute during the hearing. The Grievant was in her second year of probation when the strike occurred; she participated in the strike

from its outset; she, along with 3 other probationary teachers, was non-renewed for the 2005 – 2006 school year; her position was later reposted; she applied for the position; and someone else was hired.

The Arbitrator pondered the following questions before deciding this case:

1. How did the District view the Grievant's job performance prior to the strike?
2. How did the District view the Grievant's job performance after the strike?
3. Would it be reasonable to assume that the District was unhappy with the Grievant's strike-related activities?
4. And finally, If there had not been a strike, is it reasonable to assume that the District would have continued the Grievant's employment?

1). How did the District view the Grievant's job performance prior to the strike?

ARBITRATOR'S NOTE: The following are comments found in the Grievant's first five evaluations (Joint Exhibit 4):

October, 2003, evaluation:

Ms. Norberg [the Grievant] is extremely enthusiastic about teaching her students the Spanish language. She provides many different ways to practice these developing language skills. Ms. Norberg varies the activities to keep students interested in the lesson. Finally, Ms. Norberg used many excellent closing activities to check for student understanding. Keep up the good work!

December, 2003, evaluation:

Ms. Norberg has helped with the Levy Referendum Committee tasks this fall. She is very committed to providing the best educational learning environment to all students. She also handled a tough situation after first quarter . . . very professionally and graciously.

Ms. Norberg handles her classroom like a seasoned professional. I was very impressed with the way she handled the misspelled word on the board. . . . The lesson today was also excellent. Students need many varied activities to keep things interesting. As I mentioned earlier in this report, some of the students really took

this activity and ran with it. This was fun to watch. Ms. Norberg makes learning the Spanish language enjoyable experience. Keep up the good work!

March, 2004, evaluation:

Ms. Norberg continues to volunteer her talents to serve the District. She most recently agreed to become a member of the District-wide Staff Development Committee. I appreciate all of Ms. Norberg's efforts to make our school better.

Ms. Norberg is getting to be more relaxed with her students than she was at the beginning of the year. She is in charge of her classroom. Students seem to respond very well to her style of teaching.

Ms. Norberg needs to continue to ask for guidance from her mentors and myself. By doing this, Ms. Norberg will continue to develop into an excellent Spanish teacher.

September, 2004, evaluation:

Ms. Norberg continues to help out with supervision at dances. She is a positive presence in the high school and the students really respond/relate to her as a teacher.

Ms. Norberg is extremely enthusiastic about teaching her students the Spanish language. She is getting more comfortable in her second year. Her teaching methods are becoming more polished as time passes. Keep up the good work!

November, 2004, evaluation:

Ms. Norberg continues to help out with supervision at dances. She is a positive and enthusiastic presence in the high school. Ms. Norberg is working hard to fund-raise and prepare for a trip to Mexico this summer with participating students.

Students relate well to Ms. Norberg. She provides excellent activities such as the board questions that check for student understanding and keep students engaged. The worksheet did an excellent job of reinforcing tense and closing the lesson. Ms. Norberg told students she would correct the answers to the board questions and hand them back to the students tomorrow so they could see how they did. This quick turn around time for handing them back corrected work is not only a sound educational practice,

it shows students that you care about them enough to go through their work and provide corrections so they can learn from their mistakes. Keep up the good work!

While these evaluations also included some constructive criticisms and suggestions to stay in communication with the Grievant's mentor and principal, I was unable to find anything that was truly negative.

It is clear to the Arbitrator that the District (at least Jim Christenson) thought very highly of the Grievant prior to the strike. I found testimony about her being only an "average" or "adequate" probationary teacher to be less than sincere; those assertions did not reflect the record.

2). How did the District view the Grievant's job performance after the strike?

ARBITRATOR'S NOTE: the following are comments found in the Grievant's sixth and final evaluation (Joint Exhibit 4):

Other Comments:

Before the teachers strike, a parent came to me with concerns about comments made by Mrs. Morrow in class where she discussed behaving poorly if substitute/replacement teachers were brought in during the strike. When I asked Mrs. Morrow about this, she denied any part in this. During the strike I had other parents come to me with the same concern. When I talked to Mrs. Morrow about this before this last observation, she admitted to discussing this with her students and she apologized for doing this. Mrs. Morrow was to accompany six students to Mexico this summer. Because of decisions made by Mrs. Morrow in haste and without consulting her mentor or myself, she has had to forfeit this opportunity.

Commendations/Recommendations:

I liked the way Mrs. Morrow took attendance today. Besides being something new for the students it gave them a chance to speak Spanish too. Mrs. Morrow also does a good job of using the text book and the various activities in the text.

Because so many students learn through their auditory senses, I would like to see Mrs. Morrow (and the students) speak more Spanish in her classroom. The collage will be an excellent activity if you have students either write or speak Spanish in her classroom. The collage will be an excellent activity if you have students either write or speak Spanish about their seasonal pictures. Lastly, I hope

Mrs. Morrow will take action/precaution to correct the concerns I outlined in the “other Comments” section of this report.

While it is obvious that the tone of this evaluation is different from the five previous evaluations, I do not find it to be overly harsh. As to the remarks in the “Other Comments” section, employers are given wide discretion in the evaluation of employees. Since the Grievant did “lie” to the principal about non-protected behavior prior to the strike, I believe it was appropriate to mention it in the evaluation. And, although the trip to Mexico was less related to her employment with the District, once again, employers are given wide discretion in areas of evaluation.

The more significant difference between this evaluation and its predecessors is the lack of superlatives that were common in the others. And, no longer did I find the assurances regarding the predictable continuation of the Grievant’s employment that were typical in the others:

“Keep up the good work” (more than once)

“I appreciate all of Ms. Norberg’s efforts to make our school better”

“Her teaching methods are becoming more polished as time passes”

“She is a positive presence in the high school . . . “

“Ms. Norberg handles her classroom like a seasoned professional”

3). Is it reasonable to assume that the District was unhappy with the Grievant’s strike-related activities?

Although the “inappropriate remarks” issue occurred before the strike (non-protected behavior), it is obvious to this observer that the Grievant’s remarks were not well received by the District. I agree with the District’s reaction to the remarks, and I agree with their pointed criticism of the Grievant for lying to the principal. And, although one could grade the severity of lying based on how long a person continues to foster the lie, a lie is a lie – the District deserved better. However, to the Grievant’s credit, she eventually (either later in the first meeting, or during the second meeting) owned up to her inappropriate behavior, and she apologized.

Regarding the strike itself, it is clear that the District desperately needed teachers when they decided to keep the schools open. Yet, the Grievant, a probationary, non-tenured teacher, chose to go immediately from the classroom to the picket line. It is fair to assume that the District was not pleased with her decision

4). If there had not been a strike, is it reasonable to assume that the District would have continued the Grievant's employment?

First, I believe that the District did the right thing when it chose to non-renew probationary employees. The uncertainty facing the District at the time of the non-renewals was enormous. How could they possibly predict what would happen with enrollment? I do, however, find the District's decision to continue the employment of "teacher 4" to be suspicious. Why did they choose to retain the only probationary teacher who chose not to participate in the strike until the very end? In addition, the evidence they presented regarding the difficulty they would encounter in re-filling the position appeared to be inconsistent with the State's analysis. (Union Exhibit 4)

I also agree with the District's right to choose whoever was best qualified for the Spanish teaching position. However, if, as the Union alleges, that process was used to cloak their dislike for the Grievant's union activities during the strike, then the District would be in violation of the MOU. Why would they choose to interview other applicants, when they had a highly valued (or at least evaluated) third year probationary employee available?

The District had the right, if their intentions were legitimate, to have other candidates compete for the Grievant's previous position. However, in view of the Grievant's past evaluations and the superintendent's statement that she would only non-renew a teacher ". . . [that] either needs improvement or is average or adequate . . ." (T. 107), I can't help but question the legitimacy of their actions.

The District, initially, interviewed three candidates, including the Grievant, and offered the position to the other two. Both applicants declined the job offer, and the District chose not to offer the position to the Grievant. The District then reopened the process with a candidate that was unavailable for the first set of interviews. They subsequently offered the job to that applicant, and she accepted the position. The District claims that the other three candidates were better qualified than the Grievant.

After the first two candidates turned down the position, it simply does not make sense that the District did not offer the position to the Grievant. They considered her qualified, and even testified that they would have "absolutely" hired her had there not been more qualified candidates. After all, she had just received (April 7, 2005) an outstanding letter of recommendation from the principal in which he stated: "I hope Mrs. Morrow will be able to remain at Crosby-Ironton and will continue to share her many talents with the students and staff in our district." (Union Exhibit 5). Why would they choose to reopen the process and select an applicant that was just completing her college requirements? Why would they choose a brand new teacher over a teacher that was familiar with the District, the high school and the students? The District went out of its way to not hire the Grievant.

Both sides of the labor dispute retained a significant amount of anger following the strike. I believe the Grievant was a victim of that post-strike animus. There are simply too many inconsistencies in the District's behavior toward the Grievant to ignore. Given all the facts, I must agree with the Union's claim that the Grievant was not retained due to her strike activities.

AWARD

The Grievant shall be reinstated as a Spanish teacher for the high school. She shall also receive all back pay and benefits as though she had been continuously employed during the 2005 – 2006 school year, less any income earned or received through other sources.

Respectfully submitted this 15th day of August, 2006.

Eugene C. Jensen, Neutral Arbitrator